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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1160

ALLEN N. BRUNWASSER, PETITIONER

v.

PITTSBURGH NATIONAL BANK, A COPORATION, AND JOHN S. WARWICK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR JOHN S. WARWICK IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 101a-103a)[1] is reported at 14 A.F.T.R. 2d 6066; it is not officially reported. The *per curiam* opinion of the court of appeals (Pet. 40) is reported at 351 F. 2d 951.

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[1] "R." refers to the printed appendix filed by petitioner in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1965 (Pet. App. 40), and a petition for rehearing was denied on December 27, 1965 (Pet. App. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

This was an action for damages by a bank depositor against a bank and an Internal Revenue agent. The complaint alleged (1) that the bank disclosed its records of the depositor's accounts to the agent without prior notice to the depositor and without obtaining his authority, and (2) various irregularties in the summons which the agent had served on the bank. The question presented is whether the district court was correct in granting summary judgment for the defendants.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are printed in the Appendix, *infra*, pp. 7-11.

STATEMENT

Petitioner brought an action for damages in a State court against Pittsburgh National Bank and John S. Warwick, an Internal Revenue agent. The action was removed to the federal district court. (R. 1a.) A complaint (R. 6a-8a) was then filed in the district court, which alleged that the bank had disclosed to the agent its ledger sheets pertaining to pe-

titioner's checking and savings accounts without notice to petitioner and without his permission, causing him "severe difficulty" (R. 6a) with the Internal Revenue Service. Warwick filed a motion for summary judgment,[2] claiming official immunity and stating under oath that he had obtained the disclosures in question in the course of an authorized tax investigation (R. 9a-10a). Petitioner responded with unverified allegations (R. 16a-28a) that Warwick had examined the bank's records without authority; that the summons procedure had been irregular because the purpose was criminal prosecution; that some of the tax years had previously been audited; that petitioner had not been given notice in advance; that the summons had been addressed to the bank rather than to each of the several employees in charge of the various records;[3] and that Warwick had taken no testimony under oath, as he could have under Section 7602 of the Internal Revenue Code of 1954.

Petitioner filed interrogatories addressed to Warwick, inquiring into the purpose of the investigation, whether any special agent was involved, whether information from an informer had prompted the investigation, and asking for all of Warwick's diary entries concerning the investigation (R. 40a-42a). The court ordered that answers be held in abeyance

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[2] The bank also filed such a motion (R. 11a-12a).

[3] The summons (R. 31a) was addressed to Pittsburgh National Bank, was made returnable "immediately", and called for the production of the bank's ledger sheets of taxpayer's savings and checking accounts for the years 1959, 1960 and 1961. It was dated December 26, 1962.

pending disposition of the motions for summary judgment (R. 44a).

At a hearing on the motions (R. 46a, *et seq.*), an officer of the bank, John L. Bell, testified that Warwick had showed him his credentials and served a summons upon him (R. 58a, 60a-61a), and that he had then authorized the several bank employees in charge of the relevant records to show the records to Warwick and directed Warwick to them. (R. 61a.) After this testimony, the hearing was suspended and the court directed petitioner to inform it within five days as to what witnesses he desired to call and what he proposed to prove (R. 80a-81a). Petitioner informed the court by letter that he requested the presence of Warwick and his supervisor and all bank and Internal Revenue Service employees concerned, and stated that he wished to inquire into all of the circumstances preceding and following the service of the summons (R. 88a-89a).

Petitioner then filed interrogatories inquiring into the customary practices and procedures followed by the bank and the Internal Revenue Service with reference to the disclosure of bank records (R. 91a-93a, 96a-98a). The court ordered the interrogatories withdrawn pending a decision on the motions for summary judgment (R. 100a), and later, without further hearing, the court granted the motions (R. 104a).

ARGUMENT

The decision below is clearly correct, and there is no issue warranting further review.

1. Petitioner's action against the Internal Revenue agent, Warwick, was plainly barred by the doctrine of official immunity. Construing petitioner's allegations most broadly, it is still obvious that Warwick was acting "within the outer perimeter" of his line of duty; and malicious purpose is not alleged. *Barr* v. *Matteo*, 360 U.S. 564, 575.

2. Even if the official immunity doctrine were inapplicable, the district court's dismissal of the complaint on motion for summary judgment was correct since the complaint failed to state a cause of action. The nub of the complaint was alleged unauthorized disclosure to Warwick by the bank of ledger sheets showing petitioner's accounts. But the ledger sheets were the property of the bank, not of petitioner; he had no standing to object to their disclosure to the Internal Revenue Service nor had the Service any duty to forewarn him of its intention to examine the bank records. *Foster* v. *United States*, 265 F. 2d 183, 187-188 (C.A. 2), certiorari denied, 360 U.S. 912; *Application of Cole*, 342 F. 2d 5, 8 (C.A. 2), certiorari denied, 381 U.S. 950; *Zimmermann* v. *Wilson*, 105 F. 2d 583 (C.A. 3). Similarly, petitioner had no standing to complain about defects in the summons procedure, since the summons was neither served upon him nor called for the production of records belonging to him. See *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2), certiorari denied, 373 U.S. 902.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 1966.

APPENDIX

Internal Revenue Code of 1954:

§ 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

(b) *Penalties.*

[26 U.S.C. 1958 ed., § 7601.]

§ 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books

of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

[26 U.S.C. 1958 ed., § 7602.]

§ 7603. SERVICE OF SUMMONS.

A summons issued under section * * * 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

[26 U.S.C. 1958 ed., § 7603.]

§ 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue

laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section * * * 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * *

[26 U.S.C. 1958 ed., § 7604.]

§ 7605. TIME AND PLACE OF EXAMINATION.

(a) *Time and Place.*—The time and place of examination pursuant to the provisions of section

* * * 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602 * * * the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) *Restrictions on Examination of Taxpayer.* —No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

[26 U.S.C. 1958 ed., § 7605.]

Treasury Regulations on Procedure and Administration (1954 Code):

§ 301.7602-1 Examination of books and witnesses.

* * * *

(c) *Persons who may issue summons.* The following officers and employees of the Internal Revenue Service are authorized to issue a summons pursuant to sections 6420(e)(2), 6421(f)(2), and 7602—

* * * *

(4) Intelligence: Director; assistant director; assistant regional commissioners; executive assistants to assistant regional commissioner; chiefs, Review and Conference Staff; reviewer-conferees; chiefs and assistant chiefs of divisions,

branches and sections; group supervisors; and special agents of the national, regional and district offices.

* * * *

(7) Audit: Chiefs of divisions and branches; group supervisors; internal revenue agents; and estate tax examiners.

[26 C.F.R., § 301.7602-1.]

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